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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 EPIC GAMES, INC.

15 Plaintiffs Counter-
defendant,

16 v.

17 APPLE INC.,

18 Defendant,
Counterclaimant,
19

Case No. 4:20-cv-05640-YGR-TSH

**ADMINISTRATIVE MOTION OF NON-
PARTY FACEBOOK, INC. TO SEAL
TRIAL EXHIBITS**

Hon. Yvonne Gonzalez Rogers

Trial: May 3, 2021

Pursuant to Local Civil Rules 7-11 and 79-5, Non-Party Facebook, Inc. (“Facebook”) hereby moves the Court for an administrative order sealing four (4) exhibits on the trial exhibit list submitted by Epic Games, Inc. (“Epic Games”), ECF 448, in whole or in part: **PX-2411** [EGFB-000264], **PX-2413** [EGFB-001138], **PX-2414** [EGFB-002073], and **PX-2415** [EGFB-002938].

These documents include:

- Internal discussions among Facebook employees regarding Facebook’s strategy for negotiations with Apple regarding distribution of Facebook gaming apps, including regarding features of gaming apps that Facebook has considered but not released and estimates of the impact of those features on an app’s success; and
- Internal discussions among Facebook employees regarding Facebook’s strategy related to video, photo and messaging products that are not at issue in this case.

Facebook respectfully requests that portions of these documents containing confidential information as indicated in Facebook’s proposed redactions be sealed from the public record and, if the documents are used during trial proceedings, that the documents’ confidential, commercially sensitive contents not be displayed in public view or revealed during examinations of witnesses or argument. Pursuant to Civil Local Rule 79-5(d)(1)(C), redacted versions of the documents sought to be sealed accompany this motion, with the exception of PX-2415 [EGFB-002938], which Facebook seeks to seal in its entirety.

LEGAL STANDARD

Although there is “a general right to inspect and copy public records and documents, including judicial records and documents,” public “access to judicial records is not absolute.” *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (internal quotation marks omitted). Thus, despite the “strong presumption in favor of access,” documents may be sealed for “compelling reasons.” *Id.* (internal quotation marks omitted).

Whether such reasons exist is a matter for “the sound discretion of the trial court,” but courts have recognized that the need to protect “sources of business information that might harm a litigant’s competitive standing” can be a compelling reason warranting sealing. *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016) (internal quotation marks omitted). Indeed, “[c]ompelling reasons may exist to seal trade secrets, marketing strategies,

1 product development plans, detailed product-specific financial information, customer information,
 2 internal reports and other such materials that could harm a party's competitive standing." *In re*
 3 *Google Location Hist. Litig.*, No. 5:18-CV-05062-EJD, 2021 WL 519380, at *10 (N.D. Cal. Jan.
 4 25, 2021) (internal quotation marks omitted).

5 Courts in this District also have sealed documents containing confidential, internal
 6 deliberations regarding product features and business strategy. *See Baird v. BlackRock*
 7 *Institutional Tr. Co., N.A.*, 403 F. Supp. 3d 765, 792 (N.D. Cal. 2019) (granting request to seal
 8 "sensitive information about the governance, administration, and operation of" BlackRock
 9 investment products and its "Investment Committee's confidential actions and deliberations");
 10 *Primus Grp., Inc. v. Inst. for Env't Health, Inc.*, 395 F. Supp. 3d 1243, 1267 (N.D. Cal. 2019)
 11 (sealing "internal Primus emails discussing Primus's costs and pricing practices that are not
 12 generally known to Primus's customers and competitors"); *Arista Networks, Inc. v. Cisco Sys.*
 13 *Inc.*, No. 16-cv-00923-BLF, 2018 WL 2010622, at *5 (N.D. Cal. Apr. 30, 2018) (sealing
 14 "information relating to Cisco's internal documents, business and competitive strategies, and
 15 private business communications" as well as "internal communications on strategy and customer
 16 requirements"); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2014 WL 12787874, at *2 (N.D.
 17 Cal. Aug. 22, 2014) (sealing "internal, nonpublic information discussing Safeway's pricing
 18 strategy, business decisionmaking, and financial records, which would expose Safeway to
 19 competitive harm if disclosed").

20 ARGUMENT

21 Epic Games has included on its trial exhibit list several documents that Facebook produced
 22 in response to third-party subpoenas from Epic and Apple that contain confidential, commercially
 23 sensitive information. As explained below, there are compelling reasons to seal these documents.

24 **PX-2411** [EGFB-000264] (Exhibit 1) is an internal Facebook document that includes
 25 confidential information regarding Facebook's strategy in negotiating with Apple regarding
 26 distribution of its apps on Apple devices as well as confidential numerical estimates of the impact
 27 that Apple's rejection of a never-released feature of Facebook's app would have on Facebook's
 28 customer base for its gaming product. Disclosure of information regarding Facebook's strategies

1 for distribution of its apps would cause Facebook harm by giving Apple and other app distributors
2 information that they could use against Facebook in future business negotiations, and could also
3 disadvantage Facebook relative to other competitors in future strategic negotiations with app
4 distributors. Sharma Decl. ¶ 7. Disclosure of information regarding features of gaming products
5 that Facebook considered but did not release, and the impact of those features on the success of its
6 product, would cause Facebook competitive harm by revealing Facebook's strategy for gaming
7 products to potential competitors. Sharma Decl. ¶ 7.

8 **PX-2413** [EGFB-001138] (Exhibit 2) is a series of internal Facebook communications in
9 which Facebook employees are discussing and deliberating the company's strategy for its
10 Facebook Gaming app following Apple's rejection of that app from its App Store in the spring of
11 2020. These communications include discussions of both Facebook's strategy in negotiating with
12 Apple regarding distribution of its apps on Apple devices and Facebook's future strategy
13 regarding features of its gaming products. Disclosure of information regarding Facebook's
14 strategies for distribution of its apps would cause Facebook harm by giving Apple and other app
15 distributors information that they could use against Facebook in future business negotiations, and
16 could also disadvantage Facebook relative to other competitors in future strategic negotiations.
17 Sharma Decl. ¶ 9. Disclosure of information regarding features of gaming products that Facebook
18 considered but did not release would cause Facebook competitive harm by revealing Facebook's
19 strategy for gaming products to potential competitors. Sharma Decl. ¶ 9.

20 **PX-2414** [EGFB-002073] (Exhibit 3) and **PX-2415** [EGFB-002938] (Exhibit 4) include
21 internal discussions among Facebook employees regarding how to approach business negotiations
22 with Apple. These documents discuss Facebook's strategy related to Apple's approval of
23 Facebook's gaming products which, if disclosed, would cause Facebook harm by giving Apple
24 and other app distributors information that they could use against Facebook in future business
25 negotiations, and could also disadvantage Facebook relative to other competitors in future
26 strategic negotiations. Sharma Decl. ¶ 11. These documents also contain confidential information
27 about Facebook's strategy for messaging, photo and video products that are not at issue in this
28 case, the disclosure of which would cause Facebook competitive harm. Sharma Decl. ¶ 11. *Cf.*

1 *Ctr. for Auto Safety*, 809 F.3d at 1101 (right to public access only applies to information “more
2 than tangentially related to the merits of a case”).

3 **CONCLUSION**

4 For the foregoing reasons, Facebook respectfully requests that the Court seal confidential
5 information as indicated by Facebook’s proposed redactions in the following exhibits on Epic
6 Games’s trial exhibit list: **PX-2411** [EGFB-000264], **PX-2413** [EGFB-001138], and **PX-2414**
7 [EGFB-002073]. For **PX-2415** [EGFB-002938], Facebook respectfully requests that the Court
8 seal the document in its entirety.

9 DATED: April 30, 2021

Respectfully submitted,

10 MUNGER, TOLLES & OLSON LLP

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12 By: /s/ Emily C. Curran-Huberty

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13 Attorneys for Third-Party Respondent
14 FACEBOOK, INC.